Ajit Pai
Chair
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Proceeding 17-108: Net Neutrality, the Open Internet Order, and how to preserve internet freedom

The Federal Communication Commission's (FCC) Open Internet Order, promulgated in 2015, must be preserved under the FCC's current authority. The proposed agency rules to reclassify Internet Service Providers (ISPs), so that they are no longer considered Common Carriers under Title II of the Communications Act, will give an unfair advantage to ISPs, and to those who can pay more to distribute their own content. This will harm consumers, and harm market-driven innovation.

I. The FCC has the legal authority to regulate ISPs under Title II

Under the Communications Act of 1934, the stated purpose of the FCC is to regulate:

> interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.
> 47 U.S.C.A. § 151.

Under this statute:

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefore, *and*

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful.
47 U.S.C.A. § 201

As stated in *United States Telecom Association v. FCC, 855 F.3d 381* (2017), the 2015 Open Internet Order is consistent with the FCC's statutory authority. In determining that the FCC has the authority to regulate ISPs at it's discretion, the court relied on settled Supreme Court precedent that has been in place for over 30 years, *see National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005) (*citing Chevron v. Natural Resources Defense Council*, 104 S.Ct. 2778 (1984)).

Based on this statutory language and the case law interpreting it, the FCC has the authority to regulate ISPs under Title II, and it should do so for several reasons.

II. Preserving a pro-competitive market requires that the FCC regulate ISPs as Common Carriers under Title II

A. Common Carrier Regulations are necessary to protect producers and consumers

Regulating ISPs under Title II is critical to maintaining not only a free and open internet, but also a free, competitive, and fair market for this country's newest entrepreneurs and innovators. Strong FCC rules regulating ISPs as Common Carriers, such that they are prohibited from favoring the content of one party over another, will go a long way in ensuring that all Americans have equal opportunity to disseminate their ideas, products and services without fear of being shut out of any market by artificially high barriers to entry.

The benefits conferred on producers by this regulation will create a net positive effect for consumers as well. A regulated, pro-competitive market will directly benefit consumers by creating a level playing field that will allow consumers to (1) select the products and content they want without restriction, and (2) not have to bear any extra costs passed on to them by producers who could not absorb increased costs from tiered pricing. A pro-competitive environment for business, governed by FCC regulation, will protect consumers who benefit from open and fair market competition.

B. Consumers do not have a meaningful choice when selecting an ISP

Some of the above might be mitigated if consumers had a meaningful choice between ISPs. This is not the case, however, and large areas of the country have only one ISP that provides internet at speeds the FCC considers to be

“Broadband” (at least 25 Mbps downstream and at least 3 Mbps upstream). This is especially true in rural areas.

If ISPs were subjected to traditional market forces, and required to compete against each other in a meaningful way, then consumers might have the option to choose between ISPs that throttled content and others that did not. According to the FCC’s own census block data, however, only 13% of Americans have access to reasonably fast Broadband internet from three or more providers, and a staggering two thirds of Americans have, at most, two Broadband ISPs to choose from in a given census block. [1]

This lack of meaningful competition means that ISPs have monopolistic or oligopolistic power to set prices in these defined areas. With this power they can deny consumers access to the content they want, or make them pay a premium, without fear of the consumers voting with their wallets by taking their business elsewhere.

To preserve a free, fair, and open market that benefits consumers and producers, The FCC must not roll back the Open Internet Order, and must continue to regulate ISPs as Common Carriers under its clear authority found in Title II of the Communications Act.

[1] Internet Access Services: Status as of June 30, 2016.
Available:https://apps.fcc.gov/edocs_public/attachmatch/DOC-344499A1.pdf